MALAYAN BANKING BHD.

v.

ASSOCIATION OF BANK OFFICERS PENINSULAR MALAYSIA & INDUSTRIAL COURT

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
WAN SULEIMAN SCJ
EUSOFFE ABDOOLCADER SCJ
[CIVIL APPEAL NO. 384 OF 1987]
22 MARCH 1988

LABOUR LAW: *Dismissal - Bank Officer - Dismissed on basis he had abused his position and trust placed on him - Industrial Court held dismissal unduly harsh and without just cause or excuse - Awarded salary, compensation in lieu of reinstatement and bonus - Whether error as to non-jurisdictional facts can in itself amount to legal error - Question of what amounts to jurisdictional defect - Not enough to establish error of law but error must go to jurisdiction, power or validity - Section 33B(1) Industrial Relations Act - Privative provisions precluding certiorari of any award, decision or order of Industrial Relations Act - Decision of Industrial Court clearly perverse and so devoid of plausible justification - Whether privative provision of s. 33 would still apply - Award of Industrial Court quashed.*

In this case Lim Tong Sun (Lim who was a Class II Officer attached to the appellant Bank at the Cameron Highlands Branch) was dismissed after he was found guilty by the panel of inquiry in respect of several charges framed against him. The charges were that he had issued two cheques but closed his account with the Bank before they could be presented and then issued three more cheques after closing his account, borrowing money from a customer of the Bank at the latter's house and further of breach of duty in failing to abide by instructions requiring him to stay at his place of residence in Cameron Highlands during normal working hours whilst under suspension. The basis of the dismissal was that he had abused his position and misplaced the trust put in him as an Officer of the Bank.

The Industrial Court held the dismissal was unduly harsh and therefore without just cause or excuse. The appellant Bank then applied for *certiorari* to quash the award but the High Court held that the Industrial Court acted well within its jurisdiction and dismissed the application with costs. Hence this appeal by the appellant Bank.

The appeal was concerned primarily on the determination of the question of an error of law amounting to excess or lack of or defect in jurisdiction sufficient to preclude the postulate of a statutory privative clause prohibiting *certiorari* to quash an award.

Held:

[1] The general principle would appear to be that it will usually be proper to treat a decision-maker's tasks of fact finding and the drawing of factual inferences from established facts as falling within the decision-maker's jurisdiction unless the decision-maker has reached absurd results or reached results absurdly.

[2] The finding of the Industrial Court that the misconduct in respect of the two cheques issued by him which it found substantiated did not relate to his work, his duties and responsibilities as a Class II Officer of the Bank appears to be a completely perverse finding.

[3] A perusal of the proceedings at the domestic inquiry did not substantiate the conclusion of the Industrial Court that the domestic inquiry held by the Bank was biased in that the panel which conducted it did not approach the matter with an open mind and appeared to be prejudiced primarily on the premises that the questions put to him the employee by members of the panel were incriminating.

[4] In the light of the several matters that have been discussed and considered against the background of the law in regard to jurisdictional error, the decision of the Industrial Court was clearly perverse and so devoid of plausible justification that no reasonable body of persons could have reached it. The Industrial Court accordingly transcended its jurisdiction in making the award that it did and the privative provisions of s. 33B(1) of the Industrial Relations Act would not accordingly preclude the issue of *certiorari* in the circumstances.

[Allowed with costs. Order of High Court set aside. Certiorari issued to quash award of the Industrial Court.]

Cases referred to:
Mak Sik Kwong v. Minister of Home Affairs, Malaysia (No. 2) [1968] 2 MLJ 175
Chan Siew Kim v. Woi Fung Sheng Tim Medical Store & Anor. [1978] 1 MLJ 144
South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union & Ors. [1981] AC 363
Rex v. Nat Bell Liquors Ltd. [1922] 2 AC 128
O'Reilly v. Mackman [1983] 2 AC 237
Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 AC 147
Tanjong Jaga Sdn. Bhd. v. Minister of Labour and Manpower & Anor. [1987] CLJ (Rep) 368
Bromley London Borough Council v. Greater London Council & Anor. [1983] 1 AC 768
Regina v. Secretary of State for the Home Department, Ex parte Asif Mahmood Khan [1984] 1 WLR 1337
Minister for Aboriginal Affairs v. Peko-Wallsend Ltd. [1986] 66 ALR 299
Regina v. Deputy Industrial Injuries Commissioner, Ex parte Moore [1965] 1 QB 456
Minister for Immigration and Ethnic Affairs v. Pochi [1980] 31 ALR 666
Secretary of State for Education v. Tameside Metropolitan Borough Council [1977] AC 1014
Barbaro v. Minister for Immigration and Ethnic Affairs [1982] 46 ALR 123
Peko-Wallsend Ltd. v. Minister for Aboriginal Affairs [1985] 59 ALR 51
Hollis v. Secretary of State for the Environment [1982] 47 P & CR 351
Daganayasi v. Minister for Immigration [1980] 2 NZLR 130
Laker Airways Ltd. v. Department of Trade [1977] 1 QB 643
Ashbridge Investments Ltd. v. Minister of Housing and Local Government [1965] 1 WLR 1320
Coleen Properties Ltd. v. Minister of Housing and Local Government [1971] 1 WLR 433
Ramiah v. State Bank of India [1964] AIR Madras 335

Legislation Referred to:
Industrial Relations Act 1967, ss. 26(2), 33B(1).

For the appellant - T.M. Varughese; M/s. T.M. Varughese & Co.
For the 1st respondent - K.P. Gengadharan; M/s. Genga Maha Wong & Co.

JUDGMENT

Eusoffe Abdoolcader SCJ:

This appeal centres primarily on the determination of the question of an error of law amounting to excess or lack of or defect in jurisdiction sufficient to preclude the postulate of a statutory privative clause prohibiting *certiorari* to quash an industrial award.

Lim Tong Sun ('Lim') was at the time of his dismissal a Class II Officer attached to the Cameron Highlands Branch of the appellant Bank. A domestic inquiry was held in respect of charges against him that he had issued two cheques but closed his account with the Bank before they could be presented, and then issued three more cheques after closing his account, and of impersonating the Branch Manager of the Bank and borrowing money from a customer of the Bank at the latter's house, and further of breach of duty in failing to abide by instructions requiring him to stay at his place of residence in Cameron Highlands during normal working hours whilst under suspension. The panel of inquiry found Lim guilty on all the charges except that of impersonation and as a result he was dismissed on the basis that he had abused his position and misplaced the trust put in him as an officer of the Bank. The respondent, a trade union of which Lim was a member, took issue on his behalf in the matter of his dismissal, and as a result a trade dispute ensued which was referred by the Minister of Labour and Manpower to the Industrial Court under the provisions of s. 26(2) of the Industrial Relations Act 1967.

The Industrial Court held the dismissal of Lim to be unduly harsh and therefore without just cause or excuse. It did not however think it appropriate to direct reinstatement and accordingly awarded to Lim as an alternative remedy a sum of RM61,056 for salary due as at the last date of hearing before the Industrial Court, namely, 18 October 1986, compensation in lieu of reinstatement and bonus for 1984 and 1985, with a direction for the appropriate deduction and payment of his Employees Provident Fund contributions up to 18 October 1986. The Bank then applied to the High Court for *certiorari* to quash the award but Harun Hashim J holding that the Industrial Court acted well within its jurisdiction dismissed the application with costs.

It would be appropriate to initially consider the law in this regard and then relate its application to the facts of the matter before us. Section 33B(1) of the Industrial Relations Act enacts a privative clause precluding *certiorari* in respect of any award, decision or order of the Industrial Court under the Act. I held in *Mak Sik Kwong v. Minister of Home Affairs, Malaysia (No. 2)* [1968] 2 MLJ 175 (at p. 179) that a privative clause of this nature is not operative in the face of a jurisdictional defect or fraud and has no effect at all as regards jurisdictional review, and reaffirmed this in *Chan Siew Kim v. Woi Fung Sheng Tim Medical Store & Anor* [1978] 1 MLJ 144 (at p. 146); both these cases were cited with approval by the Privy Council in *South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union & Ors.* [1981] AC 363 (at pp. 372-373).

I discussed and analysed at some length the question of what amounts to a jurisdictional defect in *Mak Sik Kwong (No. 2)* (at pp. 177-179) and in *Chan Siew Kim* where I said (at p. 146):

> The question of whether or not there is a manifest defect of jurisdiction will be one for consideration and determination on the particular circumstances of each case as it arises in the light of the principles discussed and postulated in my judgment in the case referred to [*Mak Sik Kwong (No. 2)*]...

For a jurisdictional defect, it is not enough to establish error of law. It must be shown that that error goes to jurisdiction, power or validity.

The question that must now be confronted is whether error as to non-jurisdictional facts can in itself amount to legal error. The starting point must necessarily be Lord Sumner's classic judgment in *Rex v. Nat Bell Liquors Ltd.* [1922] 2 AC 128 (at p. 152):

> It has been said that the matter may be regarded as a question of jurisdiction, and that a justice who convicts without evidence is acting without jurisdiction to do so. Accordingly, want of essential evidence, if ascertained somehow, is on the same footing as want of qualification in the magistrate, and goes to the question of his right to enter on the case at all. Want of evidence on which to convict is the same as want of jurisdiction to take evidence at all. This, clearly, is erroneous. A justice who convicts without evidence is doing something that he ought not do, but he is doing it as a Judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not. How a magistrate who has acted within his jurisdiction up to the point at which the missing evidence should have been, but was not given, can, thereafter, be said by a kind of relation back to have had no jurisdiction over the charge at all, is hard to see.

Lord Denning MR said in *O'Reilly v. Mackman* [1983] 2 AC 237 (at p. 253) that the *Nat Bell* decision represented administrative law's darkest hour. Its effects can still be seen in some modern-day judgments which deny absolutely the possibility that acting on no, let alone insufficient, evidence or other factual material can ever amount to a jurisdictional error.

But the *Nat Bell* reasoning, on which the result (the rejection of 'no evidence' as a jurisdictional ground of review) was based, was wrong, and always had been. There have always been jurisdictional grounds of review for errors committed in the course of an inquiry validly commenced. Fraud, breach of natural justice, and applying the wrong test are the easiest examples. These are all vitiating errors occurring in the course of an inquiry properly commenced, and yet the *Nat Bell* theory of jurisdiction was not finally rejected until the House of Lords decision in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147. It is now possible but no longer necessary to treat factual error as unreviewable, and I would refer in this regard to the passage in my judgment in *Chan Siew Kim* (at p. 146) which I have adverted to earlier.

The general principle would appear to be that it will usually be proper to treat a decision-maker's tasks of fact-finding and the drawing of factual inferences from established facts as falling within the decision-maker's jurisdiction, unless the decision-maker has reached absurd results or reached results absurdly. I should perhaps pause here to refer to my judgment in this regard in *Tanjong Jaga Sdn. Bhd. v. Minister of Labour and Manpower & Anor*. [1987] CLJ (Rep) 368 where in dealing with the question of unreasonableness I alluded (at p. 374) to Lord Diplock's exegesis in *Bromley London Borough Council v. Greater London Council & Anor*. [1983] 1 AC 768 (at p. 821) in regard to decisions that, looked at objectively are so devoid of any plausible justification that no reasonable body of persons could have reached them, and it would not perhaps be amiss to refer in this context to Dunn LJ's assertion in *Regina v. Secretary of State for the Home Department, Ex parte Asif Mahmood Khan* [1984] 1 WLR 1337 (at p. 1352) that 'The categories of unreasonableness are not closed...' Mason J said in *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd.* [1986] 66 ALR 299 (at p. 310) that it might be possible to challenge a decision which has

> failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations, or the taking into account of irrelevant considerations, but that the decision is 'manifestly unreasonable' ... (A) Court should proceed with caution when reviewing an administrative decision on the ground that it does not give proper weight to relevant factors, lest it exceed its supervisory role by reviewing the decision on its merits.

A line of cases has recently emerged which asserts a judicial power to review decisions upon the ground that they lack a rationally probative basis in fact. The first case was *Regina v. Deputy Industrial Injuries Commissioner, Ex parte Moore* [1965] 1 QB 456 in which Diplock LJ stated (at p. 488) that natural justice requires decision-makers to base their decisions 'upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event which would be relevant. It means that (the decision-maker) must not spin a coin or consult an astrologer ...'. *Ex parte Moore* has been approved in Australia in *Minister for Immigration and Ethnic Affairs v. Pochi* [1980] 31 ALR 666 (At pp. 688-690 per Deane J).

There are then some cases which assert that a jurisdictional error is committed if a decision-maker acts upon an incorrect basis in fact. The leading case is *Secretary of State for Education v. Tameside Metropolitan Borough Council* [1977] AC 1014, in which Lord Wilberforce said (at p. 1047) that an official exercising a discretionary power commits a jurisdictional error if he or she acts 'upon an incorrect basis of fact'. *Tameside* has been endorsed in Australia (*Barbaro v. Minister for Immigration and Ethnic Affairs* [1982] 46 ALR 123 (at p. 127); *Peko-Wallsend Ltd. v. Minister for Aboriginal Affairs* [1985] 59 ALR 51 (at p. 77)), England (*Hollis v. Secretary of State for the Environment* [1982] 47 P. & CR. 351) and New Zealand (*Daganayasi v. Minister for Immigration* [1980] 2 NZLR 130 (at p. 149)). Lord Denning MR has also suggested some widening of the scope of review of the exercise of discretion for factual error in *Laker Airways Ltd. v. Department of Trade* [1977] 1 QB 643 by his predication (at p. 706) that:

> the Courts can examine the exercise of (discretionary) powers to see that they are used properly, and not improperly or mistakenly. By 'mistakenly' I mean under the influence of a misdirection in fact or in law.

In *Ashbridge Investments Ltd. v. Minister of Housing and Local Government* [1965] 1 WLR 1320 Lord Denning MR said (at p. 1326) in the context of a challenge to the Minister's confirmation of a compulsory purchase order:

> The Court can only interfere on the ground that the Minister has gone outside the powers of the Act or that any requirement of the Act has not been complied with. Under this section it seems to me that the Court can interfere with the Minister's decision if he has acted on no evidence; or if he has come to a conclusion to which on the evidence he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or vice versa; or has otherwise gone wrong in law. It is identical with the position when the Court has power to interfere with the decision of a lower tribunal which has erred in point of law.

Ashbridge could perhaps be treated as relevant only to the question of what can amount to a non-jurisdictional error of law but it was not so regarded in *Coleen Properties Ltd. v. Minister of Housing and Local Government* [1971] 1 WLR 433 where it was treated as a jurisdictional matter. In Australia, Deane J referred with approval to *Ashbridge* in *Pochi* (at p. 690).

It is now necessary to examine the question of a jurisdictional defect in the award of the Industrial Court and for this purpose to apply the law I have ventilated in this regard to the facts of the matter under consideration. The Industrial Court held that the domestic inquiry held by the Bank was biased in that the panel conducting it did not approach the matter with an open mind and appeared to be prejudiced primarily on the premise that the questions put to Lim by members of the panel were incriminating. A perusal of the proceedings at the inquiry does not substantiate any such conclusion, but holding as it did the Industrial Court then proceeded to completely ignore the proceedings at the domestic inquiry and purported to deal with the several matters of complaint against Lim independently and *de novo* on a fresh assessment.

The Industrial Court in its award dealt with the several charges regarding the cheques and accepted the explanation given by Lim regarding his conduct and honest intention but nevertheless found him guilty of misconduct in issuing two cheques in favour of Genting Berhad, and in the course of doing this made observations and drew inferences, wholly unreasonably and without any factual substratum, to the effect that there was no documentary evidence that an employee of the Bank should not borrow from a customer of the Bank and that it was the duty of the Bank to show a regulation to this effect which has been brought to the attention of its staff and that a breach of such a regulation would seriously jeopardise the employee's position in the Bank, and that the Bank had not established that borrowing money from one of its customers would give rise to conflict in the discharge of the employee's duties.

The Industrial Court in fact held that the misconduct in respect of the two cheques issued by Lim which it found substantiated did not relate to his work, his duties and responsibilities as a Class II Officer of the Bank. I must immediately say this appears to be a completely perverse finding, and cases such as *Ramiah v. State Bank of India* [1964] AIR Madras 335 involving the head cashier of a branch of a bank clearly illustrate the fact that a fraud committed by an employee in a position of trust is misconduct and that drawing cheques on a bank in which the employee has no account or an insufficient account, knowing that they will be dishonoured, is misconduct, and this would be all the more so in relation to an employee who is an officer of that very Bank itself.

The Industrial Court took into account as it said in its award Lim's past record but equated this only to 'his length of service and the quality of his past service', and went on to say that having regard to his 22 years of service and 'to equity, good conscience and the substantial merits of the case', whatever that is supposed to refer to or mean in relation to the instant matter in the face of the facts elicited and the admissions made by Lim at the domestic inquiry, it found that his dismissal was unduly harsh and therefore without just cause or excuse. It refused to even consider or take into account the fact that Lim had his annual increment withheld in 1976 and again in 1984 for two consecutive years on separate disciplinary grounds, and if it had bothered to give some consideration to the transcript of the proceedings of the domestic inquiry the Industrial Court could hardly have failed to notice that Lim's attitude and conduct at the inquiry reeked of arrogance and truculence throughout. In the light of the several matters I have discussed and considered against the background of the law in regard to jurisdictional error, the decision of the Industrial Court was clearly perverse and so devoid of plausible justification that no reasonable body of persons could have reached it. The Industrial Court accordingly transcended its jurisdiction in making the award that it did and the privative provisions of s. 33B(1) of the Industrial Relations Act would not accordingly preclude the issue of *certiorari* in the circumstances.

In the event at the conclusion of argument the Lord President and I, by a majority (with Tan Sri Wan Suleiman SCJ dissenting), allowed this appeal with costs here and below to the appellant, set aside the order of the learned Judge and issued *certiorari* to quash the award of the Industrial Court, and directed that the deposit lodged in Court by way of security be paid out to the appellant.

Also found at [1988] 1 CLJ 276